82-731

OCT 26 1982

ALEXANDER L. STEVAS,
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

EDWARD G. MCNEELY, JR.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Rule 41, Federal Rules of Criminal Procedure, require advance judicial authorization prior to the execution of an arrest warrant at a private residence during nighttime hours?

2.(a) What constitutes exigent circumstances to excuse compliance on the requirements of Title 18, United States Code, Section 3109?

(b) Must judicial approval be sought to dispense with the requirements of Title 18, United States Code, Section 3109 if the exigencies are known in advance?

3.(a) Must the trial court comply with the requirements of Title 28, United States Code, Section 849 and make specific findings before imposing an enhanced sentence under the provisions of that statute?

(b) Is the Court of Appeals excused from making independent findings after their de novo review of an enhanced sentence if the Court upholds the sentence imposed?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

EDWARD G. McNEELY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD G. McNEELY, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this cause on December 11, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals on direct appeal is unpublished and is printed as Appendix "A" hereto. The opinion of the Court of Appeals on denial of a Petition for Rehearing is unpublished and is printed as Appendix "B" hereto.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on December 11, 1981. A timely Petition for Rehearing en banc was denied on August 27, 1982, and this Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

JOINDER

Petitioner, EDWARD G. McNEELY, specifically adopts and joins in the

Petition filed by co-defendant at trial, FRANKIE ROBERTS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 41(c), (h), Federal Rules of Criminal Procedure; Title 18, United States Code, Section 3109; Title 21, United States Code, Section 849(b), (e), (f), (h); Rule 32, Federal Rules of Criminal Procedure; and United States Constitution, Fourth Amendment.

STATEMENT OF CASE

On October 23, 1979, at approximately 5:45 a.m., members of the Los Angeles County Sheriff Department's SWAT team, local police officers and agents of the Drug Enforcement Administration mounted a raid on the Culver City home of EDWARD G. McNEELY, Petitioner herein, to serve arrest warrants on Petitioner and three other

individuals.[1] The arrest warrants were issued following an Indictment on October 18, 1979, charging these individuals with various narcotics violations.

The planning for the raid on Petitioner's home had begun some twenty hours prior to the actual entry of the home. However, when the arrest warrants were issued, no authorization for nighttime service was obtained. Nor were any facts presented to the Magistrate to excuse the officers from complying with the knock and notice requirements of Title 18, United States Code, Section 3109.

To effectuate the entry into Petitioner's home, a four-member SWAT team was deployed. At the same time, thirteen other specially trained members

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1/ EDWARD G. McNEELY and Co-defendant, FRANKIE ROBERTS, were found during this raid. No other suspects were present.

of the Los Angeles SWAT team, numerous DEA agents, and assorted local police officers surrounded the house. The SWAT team members, wearing drab-green jumpsuits, knit caps, and combat boots, and carrying AR-1 rifles or shotguns, used a battering ram to break down, first a gate, and then the front door to Petitioner's home. Entry was made, and a "sweep search" and service of the arrest warrants followed.

However, no announcement by the entry team was made prior to its intrusion into Petitioner's home as to its presence and purpose. Further, no demand for entry was made, nor were the occupants given any opportunity to refuse entry before the officers battered down the door.

Following Petitioner'a arrest, an evidentiary hearing was held on whether

the officers were justified in not giving knock and notice. At this hearing, the District Court determined that the Government had met its burden of proof in establishing a justification by showing that the officers were faced with exigent circumstances in making the arrests.

Petitioner was subsequently tried and convicted on two of the four charges against him: conspiracy to distribute heroin and one count of distribution of heroin. He was acquitted on the other two charges, engaging in a continuing criminal enterprise (tried separately) and a second count of distribution of heroin.

On December 5, 1980, Petitioner was sentenced. The Court made a determination that Petitioner was a "dangerous special drug offender" under Title 28, United States Code, Section 849, and it sentenced Petitioner to

twelve and one-half years on each of the two counts with an additional five years on each count under the provision of the Dangerous Special Drug Offender statute for a total of thirty-five years. In addition, he was given a five-year special parole term and fined $50,000.00.

REASONS FOR GRANTING THE WRIT

1. THE BRIGHT LINE DRAWN BY THIS COURT AT THE ENTRANCE TO A PRIVATE RESIDENCE IS TRANSGRESSED BY THE NIGHTTIME EXECUTION OF AN ARREST WARRANT WITHOUT ADVANCE AUTHORIZATION BY A NEUTRAL JUDICIAL OFFICER. YET THE CIRCUMSTANCES UNDER WHICH AN ARREST WARRANT MAY BE SERVED AT NIGHT AT A PRIVATE RESIDENCE HAS NEVER BEEN ADDRESSED BY THIS COURT.

This Court has consistently affirmed the inviolability of those zones of privacy created at the threshhold of an individual's home. See, Stegald v. United States, 101 S.Ct. 1642 (1981); see also: Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980). In the opinion of Justice Stevens writing for

the majority in Payton, physical entry, whether to search or arrest, is the chief evil against which the Fourth Amendment is directed.

The critical import of this court's recent decisions is that there is no distinction for Fourth Amendment purposes between entry into a home in order to search the premises and seize property and entry to effect routine felony arrest. See, Payton v. United States, supra. It would be analomous, therefore, to require advance judicial authorization for nighttime service of search warrants while leaving the determination of when to execute an arrest warrant to the unfettered discretion of law enforcement officers.

Among the questions left open in Payton, is whether entry into a home to execute an arrest warrant is subject to the constraints of Rule 41, Federal Rules

of Criminal Procedure, which prohibits service of search warrants in the nighttime without the approval of the issuing magistrate. (See, Rule 41[c].)

This issue is fairly raised by the facts in this case since arresting officers adopted a strategy to affect McNEELY's arrest in his home which necessitated nighttime entry. Preparation for the invasion of the McNEELY residence in Culver City, California, occupied several weeks. Significantly, all circumstances leading to the supposed necessity of a nighttime execution of the arrest warrant were known to law enforcement agents throughout the planning stage. Thus, it was incumberant upon Government agents to present this information to the issuing magistrate before exceeding the very limited authority to enter a dwelling

in which a suspect lives under the aegis of an arrest warrant. Id. at 1388.

Well before the decision in Payton, this court recognized that the validity of an entry by a federal officer to affect an arrest, even without a warrant, "must be tested by criteria identical with those" which govern entry pursuant to a search warrant. See, Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190 (1958); Sabbath v. United States, 391 U.S. 585, 88 S.Ct. 1755 (1968). The policies underlying Miller and Sabbath which extended the statutory knock and announce requirements of 18 U.S.C. 3109, compel a similar liberal interpretation of Rule 41 to encompass home arrests pursuant to warrants.2/

2/ Rule 41 already controls arrests of persons pursuant to search warrants. Failure to include all federal warrants within the ambit of that rule leaves to the inequitable result that persons

[continued]

2. THE OPINIONS BELOW ARE INCONSISTENT WITH THIS COURT'S DECISIONS IN MILLER V. UNITED STATES AND SABBATH V. UNITED STATES AS FOLLOWED BY THE SIXTH CIRCUIT IN UNITED STATES V. MURRIE. THIS COURT SHOULD SET FORTH A RULE ON WHAT CONSTITUTES SUFFICIENT EXIGENT CIRCUMSTANCES TO DISPENSE WITH REQUIREMENTS OF SECTION 3109 AND REQUIRE THAT SPECIFIC ARTICULABLE FACTS BE SHOWN IN SUPPORT OF THESE EXIGENCIES.

It is beyond cavil that an entry into a dwelling to execute an arrest warrant should be scrutinized under the standards embodied in Title 18, United States Code, Section 3109. Sabbath v. United States, supra; Miller v. United States, supra, United States v. Murrie, 534 F.2d 695, 697 (6th Cir. 1976). Further, although this court has never decided whether Section 3109 is

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2/ [continued]
arrested pursuant to a search warrant are afforded the additional protections of Rule 41 while others, such as Mr. McNEELY, whose homes are invaded for the purpose of arrest are not.

incorporated into the Fourth Amendment, it did leave this issue open in Sabbath, and many federal courts have so held. See, e.g., United States v. Murrie, supra at 698; United States v. Francis, 649 F.2d 251, 257 (6th Cir. 1981).

In the present case, the District Court correctly noted that law enforcement officers failed to comply with the knock and notice requirement of Section 3109 when they battered down the door to Petitioner's home. However, both the District Court and the Court of Appeals held this conduct to be justified by exigent circumstances. According to the Court of Appeals, exigent circumstances existed because: (1) Petitioner was known and believed to have been involved in heroin traffic and had a well-established criminal record; and (2) information possessed by police,

although not too fresh, indicated that Petitioner might be protected by armed guards. (See Appendix "A", Slip Opinion page 3, emphasis added.) Both circumstances were known to the members of the raiding party during the planning for the raid on Petitioner's home.

This Court has not directly addressed the issue of whether the circumstances noted above constitute a sufficient exigency to excuse compliance with the knock and notice requirement of Section 3109. In light of the law's reverance for an individual's right of privacy in his own home codified in Section 3109 (see, Sabbath v. United States, supra; Miller v. United States, supra), the conduct by officers in this case cannot be countenanced on the basis of the circumstances herein.

Standing alone, the fact that a

defendant is extensively involved in narcotics trafficking, or that he has a prior felony conviction, even for a violent crime, is not sufficient per se to amount to an exigenct circumstance. See, United States v. Montano, 613 F.2d 147 (6th Cir. 1980). Otherwise,, no knock and notice would be required prior to any arrest or search at a defendant's home where defendant was suspected of drug trafficking or he possessed a criminal record. Section 3109 would thus be effectively nullified and the intent of Congress in enacting Section 3109 would be abrogated.

Further, although a police officer's belief that announcement would place him or his associates in physical peril may excuse the required knock and notice, any such belief in the present case was clearly unreasonable.

When officers raided Petitioner's

home, they had no idea whether the occupants actually possessed guns. Any "claimed belief" could not be based on speculation or conjecture. There were no facts indicating that Petitioner or other occupants of his home had a propensity of violence [see, e.g., United States v. Garcia-Mendez, 437 F.2d 85 (5th Cir. 1971) (per curiam)], or that anyone of them had ever used a weapon in prior criminal activity [see, e.g., United States v. Scott, 520 F.2d 697, 700-701 (9th Cir. 1975); Rodriguez v. Jones, 473 F.2d 599, 606-607 (5th Cir. 1973); United States v. Harris, 435 F.2d 74, 81-82 (D.C. Cir. 1970)].

It has been held that in the context of serving a search warrant at the apartment of a defendant suspected of drug trafficking, that the mere possession or ownership of a gun did not warrant a finding of exigent

circumstances. See, United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976). Here, as in Fluker, the fact that Petitioner or those around him had been suspected of possessing guns in the past, could not support a reasonable belief that they were armed at the time of the raid on Petitioner's home. This is particularly true when, as in the present case, the information that Petitioner and his associates had previously possessed guns was stale, having been initially obtained years before from informants whose identity and reliability were not made known. Aside from this, on only one occasions was an associate of Petitioner actually observed carrying a weapon.

Surely, such a severe invasion of privacy as occurred in this case--an unannounced nighttime entry into a private home--cannot be based on mere

suspicion or hunch. Such an intrusion should at least require the same "specific and articulable facts" which are required to warrant the least intrusive encounter between police and citizenry: the investigatory stop. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

Since no "specific and articulable facts" that the occupants of Petitioner's home actually possessed guns were known to officers when they made their unannounced intrusion into defendant's home, their failure to give knock and notice pursuant to Section 3109 was not excused.

There is no question that the information regarding the past possession of guns by Petitioner and his associates was known for some time prior to the issuance of the arrest warrants. Therefore, even if the information known

to officers could arguably be deemed sufficiently "specific and articulable," there is no reason why it could not have been made known to the Magistrate so he could made the necessary judgment whether the requirements of Section 3109 should be excused.

One of the purposes of Section 3109 is to actually safeguard officers who might be mistaken, upon an unannounced intrusion into a home, for someone else who has no right to be there. Sabbath v. United States, supra at 589; Miller v. United States, supra at 313, fn. 12. Since the officers' failure to announce their presence and purpose created a greater danger to themselves, and, in light of the interest in protecting the privacy rights of individuals in their homes, the police conduct in this case cannot be excused and the arrest of Petitioner was illegal.

On this basis, Petitioner's conviction must be overturned.

3. THE CIRCUIT COURT OF APPEALS' RULING THAT "FINDINGS" WERE NOT NECESSARY VIOLATES THE CLEAR MANDATE OF TITLE 18, UNITED STATES CODE, SECTION 849, AND THIS COURT MUST SET FORTH THE MINIMUM REQUIREMENTS FOR IMPOSITION AND REVIEW OF SENTENCES UNDER THE DANGEROUS SPECIAL DRUG OFFENDER STATUTE.

On appeal, Petitioner raised several substantial issues with respect to his sentencing as a dangerous special drug offender.[3/] Meaningful review of the

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3/ Summary disposition was made of the following substantial sentencing issues on appeal: (1) Enhanced sentence under Section 849 cannot be imposed unless the maximum term otherwise authorized for the felony charged has also been imposed; (2) trial judge's imposition of sentences under both underlying law prescribing penalties for particular violations and under the enhancement provisions of 849(b) amounted to double punishment; (3) imposition of an enhanced sentence of thirty-five years is impermissible under the provisions of 21 U.S.C. 849; (4) the district court failed to place in the record identification of the information relied upon and its reasons for the sentence imposed as required by Section 849(b); and (5) the appellate court [continued]

District Court's holdings was impossible due to the failure of that court to make the requisite findings. The Court below compounded this error by ruling that it also was absolved from making findings.

The factual predicate for Petitioner's contention that Title 21, United States Code, Section 849 was improperly applied in his case is found in the District Court's explicit

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3/ [continued]
failed to state the reasons for its disposition of the review of the sentence, as required by 21 U.S.C. 849(h).

Another important issue which was overlooked by the Court of Appeals on direct appeal and on its denial for a rehearing is Petitioner's contention that he was not afforded a fair and adequate opportunity to examine the probation officer who prepared the presentence report in order to rebut information contained therein, in violation of his right to due process of law. (See, Rule 32, Federal Rules of Criminal Procedure; United States v. Stewart, 531 F.2d 326, 332 [6th Cir. 1976].)

statement that it was imposing a sentence of twelve and one-half years out of a maximum of fifteen years for each of the counts of which Petitioner was convicted, plus five additional years for each count as enhancements under Section 849 and its failure to make findings contrary to the mandates of Section 849. Section 849(f) requires a finding that a defendant is "dangerous," i.e., that confinement for a period longer than that provided by the underlying felonious violation is necessary. Thus, the court's representation that it was imposing, or that it would impose, less than the maximum term for each of the underlying offenses is incompatable with a finding of dangerousness within the meaning of the statute. Further, neither the District Court nor the appellate court made findings of fact to support its imposition of an enhancement under

Section 849.

A related problem was examined by the Second Circuit Court of Appeals in United States v. DiFrancesco, 658 F.2d 33 (2nd Cir. 1981), in the context of sentencing under Title 18, United States Code, Section 3575. In DiFrancesco, the defendant was convicted in one trial of violating 18 U.S.C. 1962 (RICO) for conducting an arson-for-hire business in Rochester, New York. In a second trial, he was convicted of various crimes surrounding the bombing of the Federal Building in Rochester. He was sentenced to a total of nine years for his involvement in the bombing. Subsequently, he was sentenced as a dangerous special offender to two concurrent ten years terms of imprisonment for his RICO violations. These terms were to be served concurrently with the nine years imposed

for the bombing conviction.

In effect, DiFrancesco received only a one year prison term for his involvement in the arson ring, even though the maximum term under that statute is twenty years for each count. On the Government's appeal from this sentence, the Court of Appeals held that the defendant must be resentenced because the trial court's finding of "dangerous," and the resulting sentence of less than the maximum provided for the "trigger" felony offense were inconsistent. Id. at 38.[4/]

Although the aggregate sentence imposed in the instant case exceeds the

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4/ This decision followed a remand from the United States Supreme Court in a case by the same name (at 449 U.S. 117), in which this Court upheld the authority granted the Government by 18 U.S.C. 3576 to appeal sentences imposed under the special dangerous offender statute from attacks on double jeopardy grounds. See, United States v. DiFrancesco, 604 F.2d 769 (2nd Cir. 1979).

maximum of fifteen years prescribed by the underlying offenses, the inconsistency inherent in the District Court's sentencing pronouncements invites reversal on the basis of reasoning similar to that employed in DiFrancesco. To reiterate: the imposition of less than the maximum penalty for each of the underlying felony violations is irreconcilable with the finding that defendant was "dangerous," as required by Section 849(b) and (f).

This is compounded by the fact that the finding of dangerousness in this case was not adequately reflected in the record. Instead of the reasoned findings and detailed information mandated by this statute, the District Court substituted a more conclusory statement to the effect that Petitioner McNEELY had engaged in narcotics activity on a continuous basis.

Upon review of the enhanced

sentence, the Court of Appeals summarily disposed of the substantial issues surrounding Petitioner's sentencing despite the patent insufficiency of the record findings. It compounded this error by failing to make particularized findings itself as mandated by Section 849(h).

Upon considering McNEELY's Petition for Rehearing, the same panel which heard the appeal acknowledged that it would "indeed be desireable and perhaps mandatory to make very particularized findings" but, only "if the appellate court exercised the power conferred upon it to impose or direct the imposition of a sentence which differs from that imposed by the district court . . . " (Appendix "B,"Order that the Petition for Rehearing be Denied, pages 1, 2) No authority is offered for this abrogation of the requirement for specific findings.

This is because no such authority exists. The language of the statute is clear that "review" in and of itself triggers the requirement for such findings. Thus, Petitioner herein has been deprived at each judicial level of the findings which are integral elements of due process afforded by this statute.

The failure to impose maximum sentences for each of the underlying felonies also impinged upon Petitioner's due process rights as related to the constitutional guarantees against double jeopardy and multiple punishment. In light of the District Court's findings that a period of confinement less than the maximum term constituted a satisfactory penalty for each of Petitioner's felony violations, it follows that the sentence enhancements of five years respectively were imposed for other crimes alleged in the notice filed

by the United States Attorney pursuant to 849(a) and not those actually charged.

These crimes include, for instance, a 1966 conviction, plus an allegation that McNEELY was engaged in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. Plainly, it was impermissible to use the enhancement procedure under Section 849 to exact a penalty for each of these different crimes. As for the 1966 offense, the increased sentence amounted to multiple punishment since Mr. McNEELY had already served two and one-half to three years on that conviction.[5/]

5/ Apparently, a significant factor in the court's imposition of increased sentences was its view that Mr. McNEELY had failed to serve enough time on previous convictions--particularly, a prior heroin conviction for which he had received a straight probationary sentence characterized as a "gross miscarriage of justice" by the district court.

Moreover, to the extent that Mr. McNEELY's sentence was increased to compensate for his acquittal of the Section 848 charge at a trial severed from the one which is the subject of this Petition, the sentencing court's discretion was abused.

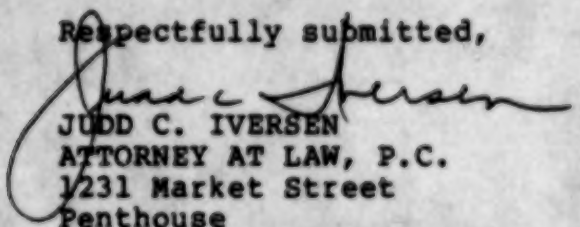
In light of this liteny of errors committed in connection with enhanced sentencing under Section 849--inconsistent sentencing strategies coupled with inadequately detailed findings, which in turn precluded full appellate review--this Court should grant Mr. McNEELY's Petition in order to clarify proper procedures under Section 849 and forclose future ideosyncratic applications of that statute in degradation of defendants' constitutional rights.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

DATED: October 25, 1982.

Respectfully submitted,



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APPENDIX "A"

OPINION OF THE COURT OF APPEALS

UNITED STATES OF AMERICA
Plaintiff

v.

WILL LYONS
FRANKIE ROBERTS
EDWARD GERALD McNEELY JR.
Defendants

NOS. 80-5408
80-5421
81-5038

United States Court of Appeals
Sixth Circuit
December 11, 1981

Before: ENGLE and KENNEDY, Circuit Judges, and PECK, Senior Judge

These appeals follow the conviction of defendants Edward Gerald McNeely, Jr., Frankie Roberts, and Will Lyons on numerous charges arising out of an extensive multistate drug operation with its principal operations being directed by the defendant Edward Gerald McNeely

from Culver City, California, and involving actual sales of drugs in Memphis, Tennessee, where the case was tried. Although variously stated, the three consolidated appeals here challenge the validity of a search of the Culver City residence of defendant McNeely at the time he and defendant Roberts were arrested and the subsequent introduction into evidence of certain drug paraphernalia and other evidence seized at that time. Defendants Roberts and Lyons also assert that there was insufficient evidence upon which a jury could find them guilty of any conspiracy. Numerous instances of prosecutorial misconduct are also alleged.

Further, it is claimed by McNeely and Lyons that the trial court erred in imposing consecutive sentences for their convictions on the conspiracy and substantive counts because both counts

involve the same elements and were prosecuted with identical evidence. Roberts argues that her acquittal on the substantive count of sale of heroin barred her conviction for conspiracy as it encompassed the identical evidence. Finally, defendant McNeely asserts that the trial judge unlawfully enhanced his sentence by misapplying the provisions of the dangerous special drug offender statute, 28 U.S.C. 849, by failing to comply with the statutory requirements, and because of the government's failure to provide him with a proper notice of its intention to seek such sentence enhancement.

The trial in the district court was extensive, commencing on August 4, 1980, and continuing until a verdict was reached on all counts except count 2, on August 21. At the severed trial of count 2 commenced thereafter defendant McNeely

was charged with engaging in a continuing criminal enterprise, 21 U.S.C. 848. That trial, however, resulted in acquittal.

The most difficult issue concerned the propriety of the pre-dawn arrest of defendants McNeely and Roberts at McNeely's well guarded California home, an arrest undertaken by Drug Enforcement Administration agents assisted by a special team of officers provided by California State law enforcement authorities. The officers employed a battering ram to gain access to the residence and to execute the arrest warrants.

Upon a consideration of the record as a whole, including all of the circumstances attendant to the arrest and the information reasonably known and understood by the arresting officers, the court is unable to disagree with the district court determination that the

police conduct was justified by exigent circumstances. McNeely was known and believed to have been extensively involved in the heroin traffic and had a well established criminal record. Information possessed by the police, although not too fresh, indicated that McNeely might be protected by armed guards and it was not unreasonable to have anticipated that a shootout might occur unless quick action were taken following the discovery of police presence by those inside. Entry into the house revealed the presence of fourteen individuals inside and numerous weapons as well as the drug paraphernalia.

During the course of the trial, it is charged that numerous instances of prosecutorial misconduct occurred, including the failure to make timely and full disclosure of discovery materials sought by the defense, the improper

injection of evidence concerning involvement of one of the unindicted coconspirators, Joyce Brown, in two murders, and the suggestion by a government witness to the jury that defendant McNeely may have been the subject of a tax evasion investigation. It is also claimed that the government unfairly sought to impeach the testimony of McNeely's mother concerning his inherited wealth by cross-examination, and that the trial judge erroneously refused to permit the defense to introduce rehablitating evidence through the records of certain probate proceedings relating to McNeely's father's estate in California. While such charges are not entirely without merit, the court is unable to hold that, either singly or together, they were of such gravity as to deny the defendants a fair trial or to have affected their

substantial rights.

The claim by McNeely and Lyons that their consecutive sentences were not appropriate because of the identity of evidence on counts 1 and 4 is without merit, it being well settled that the commission of a substantive offense and a conspiracy are separate offenses, Pinkerton v. United States, 328 U.S. 640 (1946), and it further appearing that there was different and separate evidence to support convictions on each count. Roberts' similar argument is also without merit.

Finally, the enhanced sentence imposed upon defendant McNeely as a dangerous special drug offender was supported by a sufficient notice which complied with the requirements of the statute and otherwise appears to have been adequately supported by the record and by the findings of the district

judge. United States v. Ilacqua, 562 F.2d 339 (6th Cir. 1977).

The court is further of the opinion that none of the other errors alleged by the defendants was of sufficient merit or gravity to warrant reversal.

Accordingly,

IT IS ORDERED that the judgment of the district court in each of the above appeals is affirmed.

APPENDIX "B"

OPINION OF THE COURT OF APPEALS

UNITED STATES OF AMERICA
Plaintiff

v.

FRANKIE ROBERTS
EDWARD GERALD McNEELY, JR.

NOS. 80-5421
81-5038

United States Court of Appeals
Sixth Circuit
August 27, 1982

Before: ENGEL and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge

No active judge having requested a vote on the suggestion of appellants McNeely and Roberts for a rehearing en banc of their petition filed in the above case, the petition was referred to the same panel which heard the appeal.

Appellants' petition urges in argument B.4 that this court failed to

state the reasons for its disposition of the review of the enhanced sentence imposed upon defendant McNeely as required by 21 U.S.C. 849(h), which provides:

> Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felonious violation and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, [impose a sentence itself, or remand] . . . The court of appeals shall state in writing the reasons for its disposition of the review of the sentence (emphasis added).

While the court believes it would indeed be desirable and perhaps mandatory to make very particularized findings if the appellate court exercised the power conferred upon it to impose or direct the

imposition of a sentence which differs from that imposed by the district court, where, as here, such disposition is not made, it is of the opinion that the determinations made in its earlier order are sufficient. Accordingly, the court finds that there was sufficient compliance on its part with section 849(h) under the circumstances here. The court further finds that there was no other issue raised in the petition which has not already been fully and adequately considered and disposed of earlier.

The appellants further urge that the enhanced sentence imposed by Judge Wellford under 21 U.S.C. 849 was unlawful because Judge Wellford did not first impose the maximum penalty allowable for the specific offense. Treating the consecutive seventeen and one-half year sentences imposed as one complete sentence of thirty-five years,

petitioners further claim that such was unlawful because it exceeded the twenty-five year maximum sentence provided under 21 U.S.C. 849(b). Upon consideration the court is of the opinion that neither contention has merit.

An examination of the commitment order and of the statements made upon the record by Judge Wellford at the time of sentencing satisfy us that the sentences imposed were well within his discretion under the special enhancement provisions of the Controlled Substances Act. Regardless whether Judge Wellford could properly have imposed one sentence under 21 U.S.C. 846 and a special enhancement under 21 U.S.C. 849, the record here is clear that he did not in fact do so but instead properly imposed a total sentence of seventeen and one-half years for each offense under Section 849. This appears from the actual judgment of commitment

and we are satisfied that Judge Wellford's explanation made on the record of his subjective thought processes in reaching that conclusion are simply that and do not amount to double sentences but rather a reflection upon the record of Judge Wellford's view of the kind of a sentence which would have been appropriate to the particular offense had not the enhancement been taken into account. While 21 U.S.C. 849(b) provides the sole means of sentencing a dangerous drug offender under that statute, the trial judge's explanation of his subjective calculations of the appropriate amount do not, in our judgment, amount to a double sentencing under both the underlying law prescribing the penalties for the particular violation and under the enhancement provisions of 849(b). Likewise the court is of the opinion that there is nothing

in the statute to prevent the imposition of consecutive sentences of each of the counts of which the defendant was found guilty. Different evidence was required for proof of each and there is present no basis for asserting that punishment under the two counts was either merged, or amounted to double jeopardy, or that one was subsumed in some way in the other.

The court is of the opinion that all other issues raised in the petition have already been satisfactorily addressed in the original order of affirmance. Accordingly,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

APPENDIX "C"

Federal Rules of Criminal Procedure,

Rule 41:

> . . . (c) . . . The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.
>
> . . . (h) . . . The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time.

Title 18, United States Code,

Section 3109:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Title 21, United States Code,

Section 849:

> . . . (b) Upon any plea of

guilty or nolo contendere or verdict or finding of guilty of the defendant of such felonious violation, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be

entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felonious violation and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special drug offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felonious violation. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felonious violation. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

. . . (e) A defendant is a special drug offender for purposes of this section if -- (1) the defendant has previously been convicted in

courts of the United States or a State or any political subdivision thereof for two or more offenses involving dealing in controlled substances, committed on occasions different from one another and different from such felonious violation, and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felonious violation, and less than five years have elapsed between the commission of such felonious violation and either the defendant's release, or parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense involving dealing in controlled substances and punishable by death or imprisonment in excess of one year under applicable laws of the United States or a State or any political subdivision thereof; or

(2) the defendant committed such felonious violation as part of a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felonious violation

was, or the defendant committed such felonious violation in furtherance of, a conspiracy with three or more other persons to engage in a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing, or give or receive a bribe or use force in connection with such dealing. A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such dealing. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, without reference to exceptions, under section 206(a)(1) of Title 29 for an employee engaged in commerce or

in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declare adjusted gross income under section 62 of Title 26. For purposes of paragraph (2) of this subsection, special skill or expertise in such dealing includes unusual knowledge, judgment or ability, including manual dexterity, facilitation the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of such dealing, the enlistment of accomplices in such dealing, the escape from detection or apprehension for such dealing, or the disposition of the fruits or proceeds of such dealing. For purposes of paragraphs (2) and (3) of this subsection, such dealing forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

. . . (f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felonious violation is required for the protection of the public from

further criminal conduct by the defendant.

. . . (h) With respect to the imposition under this section, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the

procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felonious violation and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could orginally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court

of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of the abuse of the right of the United States to take such review.